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COURT OF CRIMINAL APPEALS
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DEANA WILLIAMSON
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Nos. _____

IN THE TEXAS COURT OF CRIMINAL APPEALS

FILED
COURT OF CRIMINAL APPEALS
12/27/2021
DEANA WILLIAMSON, CLERK

EX PARTE EMAD BISHAI, *Petitioner*

CONSOLIDATED APPEAL FROM THE NINTH COURT OF APPEALS IN BEAUMONT, TEXAS
AND
THE 359TH DISTRICT COURT FOR MONTGOMERY COUNTY, TEXAS

Trial Cause Nos.	Appellate Cause Nos.
19-11-14893-CR	09-21-00158-CR
19-11-14894-CR	09-21-00159-CR
19-11-14896-CR	09-21-00160-CR
19-11-14902-CR	09-21-00161-CR
19-11-14905-CR	09-21-00162-CR
20-09-11172-CR	09-21-00163-CR

PETITION FOR DISCRETIONARY REVIEW

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STATEMENT REGARDING ORAL ARGUMENT

The court of appeals addressed a novel issue regarding the cognizability of a pretrial habeas challenge to the constitutionality of statute when multiple indictments – some based on the challenged statute and some not – are consolidated for trial.[1] Oral argument will assist the Court in determining whether a defendant can be forced to trial on flawed indictments that have been joined with separate indictments based on a different, unchallenged statute.

STATEMENT OF THE CASE

This is a consolidated appeal from the denial of six pretrial applications for writ of habeas corpus.

Petitioner Emad Bishai, a medical doctor, was charged in six indictments with violations of Texas Occupations Code § 165.152. Each of those indictments relied on Texas Occupations Code § 164.053 to set out the manner and means of the § 165.152 violations. The State also charged Dr. Bishai in four indictments alleging violations of Texas Health & Safety Code § 481.128.

The State joined eight of the ten indictments under Texas Penal Code § 3.02:[2] Five Occupations Code indictments were consolidated for trial with three Health &

[1] The court of appeals' opinion is attached as Appendix A.

[2] Texas Penal Code § 3.02 provides:
(a) A defendant may be prosecuted in a single criminal action for all offenses arising out of the same criminal episode.

Safety Code indictments.[3] One Health & Safety Code indictment was not included in the notice of joinder, and one Occupations Code indictment was left unjoined.[4] Further, on March 19, 2021, the State abandoned its notice of joinder and informed the district court via email that it intended to proceed only on one of the five consolidated Occupations Code indictments, Trial Cause No. 19-11-14905 (Appellate Cause No. 09-21-00162).[5]

On April 13, 2021, Dr. Bishai filed pretrial applications for habeas relief challenging all six Occupations Code indictments, contending Texas Occupations Code §§ 165.152 and 164.053 are facially and unconstitutionally vague. The district court denied relief. On appeal, the court of appeals refused to reach the merits of Dr. Bishai's challenge, holding the habeas claims were not cognizable because indictments charging Occupations Code violations (Tex. Occ. Code §§ 165.152 and 164.053) were consolidated for trial with indictments charging violations of an unchallenged statute (Tex. Health & Safety Code § 481.128). Panel Op. at 11.[6]

(b) When a single criminal action is based on more than one charging instrument within the jurisdiction of the trial court, the state shall file written notice of the action not less than 30 days prior to the trial.

[3] Clerk's Record (CR.) for Trial Cause No. 19-11-14893-CR (Appellate Cause No. 09-21-00158-CR) at 117.

[4] *Id.;* CR. for Trial Cause No. 19-11-14894-CR (Appellate Cause No. 09-21-00159-CR) at 68.

[5] After the court of appeals issued its opinion, Dr. Bishai requested the district clerk to prepare and file a supplemental record consisting of the State's March 19, 2021 email to the district court and defense counsel. Appendix B. As of the time of filing, the supplement had yet to be filed, but the district clerk has confirmed the supplement is in process.

[6] Notably, the State did not contest the cognizability of Dr. Bishai's claims in the district court. The court of appeals' holding that Dr. Bishai's claims were not cognizable adopted the argument in the State's brief, made for the first time on appeal. *See* State's Br. at 5-6.

STATEMENT OF PROCEDURAL HISTORY

The court of appeals issued its opinion on November 24, 2021. No motion for rehearing was filed.

QUESTION FOR REVIEW

When two indictments are consolidated for trial under Texas Penal Code § 3.02 and the first indictment is based on a statute that has been challenged via a pretrial habeas application, but the statute underlying the second indictment is not challenged, does consolidation impact the cognizability of the habeas challenge to the first indictment?

ARGUMENT

The court of appeals decided an important question regarding the cognizability of state habeas relief that has not been addressed by any other court, and the Court of Criminal Appeals should settle the matter. *See* Tex. R. App. P. 66.3(b).

The key passage from the court of appeals' opinion is:

> The purpose of a pretrial habeas corpus application is to stop trial and secure immediate release from illegal confinement or restraint. Bishai has not established that he is entitled to immediate release from confinement if he is successful in his challenges to the six indictments, nor does the record support that result. The six charges Bishai challenges in his pretrial writ are consolidated for trial with other charges contained in other indictments he has not challenged here. . . . We conclude Bishai's claims are not cognizable in a pretrial habeas [application.]

Panel Op. at 11.[7]

In concluding that Dr. Bishai's habeas claims are not cognizable, the court of appeals erred by failing to recognize: (1) every indictment is a separate – and potentially illegal – restraint on liberty; and (2) a single trial of multiple indictments is not mandatory, even when the indictments are consolidated under Texas Penal Code § 3.02.[8] Recognition of either point requires a finding that Dr. Bishai's claims are cognizable, warranting review on the merits.

A. Each Indictment Is a Separate Restraint

Each indictment is a separate "restraint" on liberty.[9] An arrest warrant or a summons must be issued "upon each indictment." Tex. Code Crim. P., art. 23.03(a). "In felony cases which are bailable, the court shall, before adjourning, fix and enter upon the minutes the amount of the bail to be required in *each* case." Tex. Code Crim. P., art. 23.12 (emphasis added).[10] Where excessive bail amounts in multiple,

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[7] As a factual matter, the court of appeals erred when it found that the six challenged indictments were consolidated for trial with the other unchallenged indictments. The State appears to have abandoned its notice of joinder altogether as evidenced in its March 19, 2021 email to the district court and defense counsel. In that email, the State represented that it would file pleadings in its cases against Dr. Bishai individually moving forward. And importantly, after March 19, the State did just that – it filed its pleadings individually *in all ten cases* against Dr. Bishai.

[8] "Whenever two or more offenses have been consolidated or joined for trial under [Texas Penal Code § 3.02], the defendant shall have a right to severance of the offenses." Tex. Penal Code § 3.04(a).

[9] *Ex parte Robinson,* 641 S.W.2d 552, 553 (Tex. Crim. App. 1982) ("A person who is subject to the conditions of a bond is restrained in his liberty[.]").

[10] Dr. Bishai was subjected to conditions of bail in each of the six cases on appeal. CR. for Trial Cause No. 19-11-14893-CR (Appellate Cause No. 09-21-00158-CR) at 16, 25; CR. for Trial Cause No. 20-09-11172-CR (Appellate Cause No. 09-21-00163-CR) at 6.

companion cases are challenged via pretrial applications for habeas relief, each bail amount – each indictment – is treated as an individual and separate restraint. *See In re Estrada*, 398 S.W.3d 723 (Tex. App.—San Antonio 2008, pet. ref'd) (bail in capital murder case was excessive, but bail in two related burglary cases was appropriate). An indictment subject to a pretrial vagueness challenge should receive the same treatment; neither logic nor law suggests otherwise.

"[A] facially unconstitutional statute is 'void from its inception' and 'considered no statute at all.'" *State v. Doyal*, 589 S.W.3d 136, 145 n.35 (Tex. Crim. App. 2019) (quoting *Smith v. State*, 463 S.W.3d 890, 895 (Tex. Crim. App. 2015)). A defendant is thus permitted to challenge an indictment based on a void statute via pretrial habeas because granting relief would bar prosecution and conviction. *See Ex parte Smith*, 178 S.W.3d 797, 801 (Tex. Crim. App. 2005). The contemporaneous pendency of another indictment charging a different statute does not make viable the indictment and prosecution of a void statute, regardless of whether the separate indictments are consolidated for trial. Each indictment is a separate charge and constitutes a separate "restraint" on liberty. Indictments receive individual consideration when excessive bail – the manner of restraint – is challenged, *see In re Estrada*, 398 S.W.3d 723, and indictments subject to a vagueness challenge – i.e., whether a defendant is restrained by a void, facially unconstitutional statute – should receive the same individual consideration.

B. A Single Trial of Consolidated Indictments Is Not Mandatory

Eight of the ten indictments against Dr. Bishai were consolidated for a single trial under Texas Penal Code § 3.02, but such a joinder does not mandate a single trial of all consolidated indictments. The State is not required to proceed on any particular indictment, much less every indictment consolidated under Texas Penal Code § 3.02. *See Neal v. State,* 150 S.W.3d 169, 173 (Tex. Crim. App. 2004) ("Both Texas and federal courts recognize that prosecutors have broad discretion in deciding which cases to prosecute."). The instant case presents a perfect example of the State's ability to choose which cases it will try: on March 19, 2021, the State informed the district court that it intended to proceed on only *one* of the (now-challenged) indictments pending against Dr. Bishai. *See* Appendix B.[11] And, regardless of the State's prosecutorial discretion, a defendant has an absolute right to opt out of a consolidated proceeding by demanding a trial on a single indictment. Tex. Penal Code § 3.04(a) ("Whenever two or more offenses have been consolidated or joined for trial under [Texas Penal Code § 3.02], the defendant shall have a right to severance of the offenses.").[12]

[11] In fact, as set out in note 7 above, the State abandoned its notice of joinder regarding *any* of the six challenged indictments.

[12] The State's decision to try only one of the consolidated Occupations Code indictments mooted the need for Dr. Bishai to exercise his right to opt out of a consolidated trial.

C. One of the Six Occupations Code Indictments Was Not Joined

The State's brief to the court of appeals asserted:

> [Dr. Bishai] faces prosecution under ten indictments, eight of which have been consolidated for trial. [Dr. Bishai's] writ applications challenge the constitutionality of the statutes underlying only six of the indictments. Even if [his] habeas arguments prevail, he would not be entitled to "immediate release" because he would remain subject to prosecution under the four unchallenged indictments.

State's Br. at 5-6.

The court of appeals apparently took the State's assertion to mean that all six Occupations Code indictments had been consolidated when that was not the case:

> **The six charges Bishai challenges in his pretrial writ are consolidated for trial with other charges contained in other indictments he has not challenged here.** . . . We conclude Bishai's claims are not cognizable in a pretrial habeas [application.]

Panel Op. at 11 (emphasis added).

The court of appeals' cognizability decision thus turned on the "consolidation" of all six Occupations Code indictments with "other charges contained in other indictments" *when the truth is* the State intended to try only one the five Occupations Code indictments that had actually been joined (Appendix B) and the sixth Occupations Code indictment had *never* been joined at all.[13]

[13] *See* CR. for Trial Cause No. 19-11-14893-CR (Appellate Cause No. 09-21-00158-CR) at 117. This amended notice of joinder was the State's last-filed notice. It requests that all filings in one

D. The Cases Relied Upon by the Court of Appeals Are Inapposite

The court of appeals relied on cases put forward by the State – *Ex parte Couch*, 629 S.W.3d 217 (Tex. Crim. App. 2021), and *Ex parte Ares*, No. 13-17-00638-CR, 2019 WL 4493698 (Tex. App.—Corpus Christi 2019, pet. ref'd) (not designated for publication) – to support its conclusion that Dr. Bishai's claims are not cognizable. Panel Op. at 8-11; State's Br. at 4-6. The court's reliance on the State's cases is misplaced.

In *Ex parte Couch*, the appellant was charged in four indictments with committing money laundering in two different ways.

> [Couch's] indictments allege that she did knowingly (1) "finance or invest" or (2) "intend to finance or invest," but her writ application challenges only the portion of the statute pertaining to the second of these, "intend to finance or invest." Thus, even if the challenged portion of the statute were struck as facially unconstitutional, it may be that only those corresponding portions of her indictments would need to be struck, and the prosecution could at least theoretically proceed on the other allegations.

Ex parte Couch, 629 S.W.3d at 217.

In *Ex parte Ares*, the appellant was charged in a two-count indictment with (1) theft and (2) securing execution of a document by deception. Ares contended that the statutes under which she was indicted (Tex. Penal Code §§ 31.03 and 32.46) were *in pari materia* with the Manufactured Housing Act (Tex. Occ. Code §

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cause be considered filed in all causes and it omits Trial Cause No. 19-11-14894 (Appellate Cause No. 09-21-00159-CR), an Occupations Code indictment, from the list of cases to be joined.

1201.451). The court held that Ares's *in pari materia* claim as to the theft count was not a cognizable pretrial habeas claim, because the theft count did not allege facts indicating she could have been charged under the Manufactured Housing Act. *Ex parte Ares,* 2019 WL 4493698 at *5. And, because the theft count was facially valid, even if Ares were to be successful on her challenge to count two of the indictment, it still would not result in her immediate release on all allegations in the indictment. Therefore, the challenge to count two was also not cognizable.

In short, a portion of the indictments in *Couch* and *Ares* would have survived even if the habeas claims had succeeded. But here, the six indictments rely solely on §§ 165.152 and 164.053. If Dr. Bishai's challenge to § 165.152 or § 164.053 succeeds, the entirety of those indictments will fail. No viable portion, or prosecution, of those indictments will remain, and the illegal "restraint" on liberty those indictments have caused will cease to exist. This is true regardless of how many other indictments alleging violations of a completely different statute are pending against him. The State's position on cognizability confuses foreclosing prosecution generally with foreclosing prosecution on separate, independent indictments. Dr. Bishai's facial challenge to §§ 165.152 and 164.053 is cognizable via pretrial writ, and merits review is warranted. *See Ex parte Weise,* 55 S.W.3d 617, 620 (Tex. Crim. App. 2001) (facial unconstitutionality may be raised by pretrial writ because invalid statute renders charging instrument void).

CONCLUSION

Each indictment constitutes a separate restraint on liberty. An indictment charging an unconstitutional statute is invalid and, as such, a void charging instrument. The court of appeals erred by relying on "consolidation" – a factually unsupported and legally immaterial point – to avoid reaching the merits of Dr. Bishai's pretrial writ claims. The conservation of judicial resources would be better served by requiring the court of appeals to address the merits of Dr. Bishai's claims now rather than allowing the prosecution of six fatally flawed indictments, charging a facially unconstitutional statute, to proceed. Discretionary review is warranted.

Respectfully submitted,

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APPENDIX A

In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-21-00158-CR
NO. 09-21-00159-CR
NO. 09-21-00160-CR
NO. 09-21-00161-CR
NO. 09-21-00162-CR
NO. 09-21-00163-CR

EX PARTE EMAD MIKHAIL TEWFIK BISHAI

On Appeal from the 359th District Court
Montgomery County, Texas
Trial Cause Nos. 19-11-14893-CR, 19-11-14894-CR,
19-11-14896-CR, 19-11-14902-CR, 19-11-14905-CR & 20-09-11172-CR

MEMORANDUM OPINION

Appellant Emad Mikhail Tewfik Bishai appeals the trial court's denial of Bishai's pretrial application for writ of habeas corpus in trial cause numbers 19-11-14893-CR (appellate cause number 09-21-00158-CR), 19-11-14894-CR (appellate cause number 09-21-00159-CR), 09-11-14896-CR (appellate cause number 09-21-00160-CR), 19-11-14902-CR (appellate cause number 09-21-00161-CR), 09-19-11-

14905-CR (appellate cause number 09-21-00162-CR), and 20-09-11172-CR (appellate cause number 09-21-00163-CR). We affirm.

Background

Bishai was charged by ten indictments with crimes related to his medical practice. The trial court signed an order consolidating eight of the ten indictments for trial. Bishai filed a pretrial application for a writ of habeas corpus in six of the ten trial causes challenging the facial validity of the underlying statutes, sections 165.152 and 164.053 of the Texas Occupations Code. The four pending cases that are not subject to Bishai's facial challenge are filed under cause numbers 19-11-14895, 19-11-14898, 19-11-14900, and 19-11-14904, and, according to Bishai, those indictments charge him with violating section 481.128 of the Texas Health and Safety Code.

Each of the challenged indictments contains a single count and charges Bishai with violating section 165.152 of the Texas Occupations Code. Section 165.152(a) states: "[a] person commits an offense if the person practices medicine in this state in violation of [Subtitle B of Title 3 of the Occupations Code, commonly known as the Medical Practice Act]." Tex. Occ. Code Ann. § 165.152(a). Violation of section 165.152 is punishable by up to ten years in the penitentiary (a third-degree felony) and final conviction also results in the forfeiture of a physician's medical license. *See id.* § 165.152(c), (d); *see also* Tex. Penal Code Ann. § 12.34(a). Each of the six

indictments challenged by Bishai relies on provisions in section 164.053 of the Texas Occupations Code to set out the manner and means of the alleged section 165.152 violations. Section 164.053 provides, in relevant part:

> (a) [U]nprofessional or dishonorable conduct likely to deceive or defraud the public includes conduct in which a physician:
> …
> (3) writes prescriptions for or dispenses to a person who:
> (A) is known to be an abuser of narcotic drugs, controlled substances, or dangerous drugs; or
> (B) the physician should have known was an abuser of narcotic drugs, controlled substances, or dangerous drugs;
> …
> (5) prescribes or administers a drug or treatment that is nontherapeutic in nature or nontherapeutic in the manner the drug or treatment is administered or prescribed;
> …
> (9) delegates professional medical responsibility or acts to a person if the delegating physician knows or has reason to know that the person is not qualified by training, experience, or licensure to perform the responsibility or acts.

Tex. Occ. Code Ann. § 164.053(a)(3), (5), (9).

Four of the indictments challenged by Bishai rely on section 164.053(a)(3) for their manner and means and allege that Bishai

> as a physician,…practice[d] medicine in violation of [the Medical Practice Act] by committing a prohibited practice, to wit: committing unprofessional or dishonorable conduct that is likely to deceive or defraud the public by writing a prescription for dispensing to [a patient], a person whom the physician knew or should have known was an abuser of narcotic drugs, controlled substances, or dangerous drugs, or by prescribing or administering a drug or treatment that is nontherapeutic in nature or nontherapeutic in the manner the drug is administered or prescribed[.]

One of the indictments challenged by Bishai relies on section 164.053(5) for its manner and means and alleges that Bishai

> as a physician,…practice[d] medicine in violation of [the Medical Practice Act] by committing a prohibited practice, to wit: committing unprofessional or dishonorable conduct that is likely to deceive or defraud the public by prescribing or administering a drug or treatment to [a patient] that is nontherapeutic in nature or nontherapeutic in the manner the drug is administered or prescribed[.]

The sixth indictment challenged by Bishai relies on section 164.053(a)(9) for its manner and means and alleges that Bishai

> as a physician,…practice[d] medicine in violation of [the Medical Malpractice Act] by committing a prohibited practice, to wit: committing unprofessional or dishonorable conduct that is likely to deceive or defraud the public by delegating professional medical responsibility or acts to a person, namely: [E.M., J.H. or M.Y.] whom the Defendant knew or had reason to know was not qualified by training, experience, or licensure to perform the responsibility or acts; or failed to supervise adequately the activities of [E.M., J.H. or M.Y.], individuals acting under the supervision of Defendant[.]

Appellate Issues

In two issues, Appellant argues that sections 165.152 and 164.053 of the Texas Occupations Code are unconstitutionally vague under federal and state law. According to Bishai, each of the six indictments against him relies on provisions in section 164.053 to set out the manner and means of the alleged section 165.152 violations. Bishai argues that he has challenged the facial validity of sections 165.152 and 164.053 in the pretrial habeas applications filed in each of the six cases, and he contends the trial court erred in denying relief.

Bishai argues that section 164.053(a)(3) and (5) has terms that are not defined and that are unconstitutionally vague. More specifically he challenges the terms "abuser of narcotic drugs, controlled substances, or dangerous drugs," "nontherapeutic in nature," "nontherapeutic in the manner the drug is administered or prescribed," and section 164.053(a)(9)'s term "professional medical responsibility or acts[]" because he contends they are not defined by statute and are all susceptible to subjective interpretation.[1] According to Bishai, he is not required to show that the challenged statutes operate unconstitutionally in all possible circumstances to prevail, and he argues that section 165.152 contains no scienter requirement and no "'determinate guidelines'[]" for law enforcement (or the public in general) to differentiate between an administrative, injunctive, or civil violation of the Medical Practice Act, and a criminal one.

The State responds that (1) Bishai's challenge is not cognizable because habeas relief would not entitle him to immediate release; (2) Bishai has not satisfied his burden to prove that the presumptively-valid statutes are unconstitutional; and (3) the statutes under which Bishai is charged are not unconstitutionally vague. We affirm.

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[1] Bishai also argues that if the State contends that section 165.152 proscribes only conduct set forth in section 164.052 (entitled "Prohibited Practices by Physician or License Applicant"), "violations of [section] 164.052 while practicing medicine are *themselves* overly broad and not statutorily defined."

Standard of Review

In reviewing a trial court's decision on a pretrial application for writ of habeas corpus, we review the facts in the light most favorable to the trial court's ruling and, absent an abuse of discretion, uphold the ruling. *Ex parte Wheeler*, 203 S.W.3d 317, 324 (Tex. Crim. App. 2006); *Ex parte Ali*, 368 S.W.3d 827, 830 (Tex. App.—Austin 2012, pet. ref'd). A trial court abuses its discretion when its decision falls outside the zone of reasonable disagreement. *Johnson v. State*, 490 S.W.3d 895, 908 (Tex. Crim. App. 2016).

Whether Bishai's Claims are Cognizable

Pretrial habeas, followed by an interlocutory appeal, is an extraordinary remedy. *Ex parte Ingram*, 533 S.W.3d 887, 891 (Tex. Crim. App. 2017); *Ex parte Perry*, 483 S.W.3d 884, 895 (Tex. Crim. App. 2016). This remedy is reserved "for situations in which the protection of the applicant's substantive rights or the conservation of judicial resources would be better served by interlocutory review." *Ex parte Weise*, 55 S.W.3d 617, 620 (Tex. Crim. App. 2001); *see Ingram*, 533 S.W.3d at 891-92; *Perry*, 483 S.W.3d at 895. Whether a claim is cognizable on pretrial habeas is a threshold issue that should be addressed before the merits of the claim may be resolved. *Ex parte Ellis*, 309 S.W.3d 71, 79 (Tex. Crim. App. 2010); *Ex parte Paxton*, 493 S.W.3d 292, 297 (Tex. App.—Dallas 2016, pet. ref'd). When determining whether an issue is cognizable by pretrial habeas, courts consider a

variety of facts, including whether the rights underlying the claims would be effectively undermined if not vindicated before trial and whether the alleged defect would bring into question the trial court's power to proceed. *Perry*, 483 S.W.3d at 895-96; *Weise*, 55 S.W.3d at 619. Appellate courts should be careful to ensure that a pretrial writ is not misused to secure pretrial appellate review of matters that should not be put before the appellate court at the pretrial state. *See Ellis*, 309 S.W.3d at 79; *Ex parte Smith*, 178 S.W.3d 797, 801 (Tex. Crim. App. 2005). "Neither a trial court nor an appellate court should entertain an application for writ of habeas corpus when there is an adequate remedy by appeal." *Weise*, 55 S.W.3d at 619.

Generally, a claim is cognizable in a pretrial writ of habeas corpus if, resolved in the applicant's favor, it would deprive the trial court of the power to proceed and result in the applicant's immediate release. *Ex parte Smith*, 185 S.W.3d 887, 892 (Tex. Crim. App. 2006) (citing *Weise*, 55 S.W.3d at 619); *see Smith*, 178 S.W.3d at 801 (explaining the defendant may use pretrial writ of habeas corpus "only in very limited circumstances[]": (1) to challenge State's power to restrain him at all; (2) to challenge manner of his pretrial restraint, such as denial of bail or conditions attached to bail; and (3) to raise certain issues that, if meritorious, would bar prosecution or conviction); *see also Perry*, 483 S.W.3d at 895 (discussing types of claims that are cognizable in pretrial writ of habeas corpus); *Weise*, 55 S.W.3d at 619-20 (same).

According to the State, Bishai's claims are not cognizable because Bishai faces prosecution under ten indictments, eight of which have been consolidated for trial, and that even if his habeas arguments prevail, he would not be entitled to immediate release because he would remain subject to prosecution under the four unchallenged indictments. The State also argues that because Bishai has an adequate remedy to present his claims by direct appeal, his pretrial writ applications should not be considered by a trial court or appellate court.

In support of its argument, the State relies on *Ex parte Couch*, 629 S.W.3d 217, 217-18 (Tex. Crim. App. 2021), and *Ex parte Ares*, No. 13-17-00638-CR, 2019 Tex. App. LEXIS 8394, at **11-12 (Tex. App.—Corpus Christi Sept. 19, 2019, pet. ref'd) (mem. op., not designated for publication). In *Ex parte Couch*, Couch was charged in four separate cause numbers with money laundering under section 34.02(a)(4) of the Texas Penal Code which provides that

> A person commits an offense if the person knowingly: finances or invests or intends to finance or invest funds that the person believes are intended to further the commission of criminal activity.

629 S.W.3d at 217 (quoting Tex. Penal Code Ann. § 34.02(a)(4)). Couch filed a pretrial application for writ of habeas corpus seeking dismissal of the indictment on the ground that the statute was facially unconstitutional because "by forbidding the mere intent to finance or invest funds intended for further the commission of criminal activity," it creates a "thought crime" under the First, Eighth, and Fourteenth

Amendments. *Id.* The trial court denied relief. *Id.* The court of appeals concluded that the statute was not facially unconstitutional and affirmed the trial court's ruling. *Id.* On Couch's petition for discretionary review, the Court of Criminal Appeals explained its rationale in remanding the case to the court of appeals to address the cognizability of the issues raised in Couch's pretrial writ application:

> In considering appellant's petition, we noticed that there may be a question about the cognizability of appellant's challenge to the statute. "[A] pretrial writ application is not appropriate when resolution of the question presented, even if resolved in favor of the applicant, would not result in immediate release." [] Here, appellant's indictments allege that she did knowingly (1) "finance or invest" or (2) "intent to finance or invest," but her writ application challenges only the portion of the statute pertaining to the second of these, "intend to finance or invest." Thus, even if the challenged portion of the statute were struck as facially unconstitutional, it may be that only those corresponding portions of her indictments would need to be struck, and the prosecution could at least theoretically proceed on the other allegations.
>
> The court of appeals should have addressed cognizability as a threshold issue before reaching the merits of the claim. []

Id. (internal citations omitted).

In *Ex parte Ares*, Ares was indicted for the felony offenses of (1) theft of property in an aggregate amount of more than $100,000 but less than $200,000; and (2) securing the execution of a document by deception with a value of $20,000 or more but less than $100,000. 2019 Tex. App. LEXIS 8394, at **1-2. Ares allegedly had taken payments through her business from customers for the purchase of mobile homes but never gave the customers the products. *Id.* at *2. She filed a pretrial writ of habeas corpus and the trial court denied relief. *Id.* On appeal, she argued that she

was being illegally restrained by criminal charges related to a civil debt and that the statute she was charged under was unconstitutional as applied to her. *Id.* The Thirteenth Court of Appeals affirmed the denial of the writ of habeas corpus. *Id.* She later filed motion to quash and dismiss the indictment on several grounds and the trial court denied relief. *Id.* at **2-3. On appeal, she argued that the statutes under which she was indicted were *in pari materia*[2] with the Manufactured Housing Act and that such a claim is cognizable in a pretrial petition for writ of habeas corpus. *Id.* at *3. The Thirteenth Court of Appeals noted that a court may only conclude that two statutes are *in pari materia* if the charging instrument "on its face" raises the issue, and the Court concluded that count one did not allege facts indicating that manufactured housing was involved or that Ares could have been charged under the Manufactured Housing Act. *Id.* at **10-11. The Thirteenth Court of Appeals further determined that Ares's challenge to count two of the indictment was not cognizable in a pretrial writ of habeas corpus because count one was valid and, therefore, even if Ares was successful on her challenge to count two, it would not result in her immediate release. *Id.* at **11-12.

[2] The Court in *Ares* explained that under the doctrine of *in pari materia*, statutes that deal with the same general subject or have the same general purpose can be construed together, statutes in conflict can be harmonized, or, in the case of an irreconcilable conflict, a specific statute controls over a more general statute. *Ex parte Ares*, No. 13-17-00638-CR, 2019 Tex. App. LEXIS 8394, at **8-9 (Tex. App.—Corpus Christi Sept. 19, 2019, pet. ref'd) (mem. op., not designated for publication).

Bishai argues in his Reply Brief that his claims are cognizable, and that *Ares* and *Couch* are distinguishable because in those cases Ares and Couch did not challenge all allegations in the respective indictments and that a portion of the indictments would have survived even if the habeas claims had succeeded. According to Bishai, if his challenges to the indictments succeed, the entirety of those six indictments will fail and no viable portion of each of the indictments will remain. He argues that "[t]he State confuses foreclosing prosecution generally with foreclosing prosecution on separate, independent indictments."

The purpose of a pretrial habeas corpus application is to stop trial and secure immediate release from illegal confinement or restraint. *Kelson v. State*, 167 S.W.3d 587, 593 (Tex. App.—Beaumont 2005, no pet.); *Green v. State*, 999 S.W.2d 474, 477 (Tex. App.—Fort Worth 1999, pet. ref'd); *see also Perry*, 483 S.W.3d at 895. Bishai has not established that he is entitled to immediate release from confinement if he is successful in his challenges to the six indictments, nor does the record support that result. The six charges Bishai challenges in his pretrial writ are consolidated for trial with other charges contained in other indictments he has not challenged here. If Bishai is convicted on any of the six challenged indictments he can make his constitutional challenges on appeal. *See Weise*, 55 S.W.3d at 619. We conclude Bishai's claims are not cognizable in a pretrial habeas, and the trial court did not abuse its discretion in denying Bishai's applications.

Because we have determined that Bishai's claims are not cognizable, we need not address the merits of his claims. *See Ellis*, 309 S.W.3d at 79; *Paxton*, 493 S.W.3d at 297. We affirm the trial court's order denying relief on Bishai's pretrial applications for writ of habeas corpus.

AFFIRMED.

_____
LEANNE JOHNSON
Justice

Submitted on October 27, 2021
Opinion Delivered November 24, 2021
Do Not Publish

Before Golemon, C.J., Kreger and Johnson, JJ.

APPENDIX B

GERGER
HENNESSY
MCFARLANE

December 16, 2021

Clerk of Court
Montgomery County District Clerk
P.O. Box 2985
Conroe, Texas 77305
Via email to:
leah.timmons@mctx.org
colleen.lawyer@mctx.org

19-11-14893

Re: *Ex parte* Emad Mikhail Tewfik Bishai;

Trial Cause Nos.	Appellate Cause Nos.
19-11-14893-CR	09-21-00158-CR
19-11-14894-CR	09-21-00159-CR
19-11-14896-CR	09-21-00160-CR
19-11-14902-CR	09-21-00161-CR
19-11-14905-CR	09-21-00162-CR
20-09-11172-CR	09-21-00163-CR

Dear Clerk,

Emad Bishai requests the District Clerk to prepare, certify and file in the appellate court a supplemental record in each of the referenced causes. *See* Tex. R. App. P. 34.5(c). The supplemental record should include this letter and its attachment, Exhibit A.

Exhibit A is an email dated March 19, 2021, from the Montgomery County District Attorney's Office to the court coordinator for the 359th District Court for Montgomery County; defense counsel is copied. The email informs the court that the State will proceed to trial on only one of the ten indictments pending against Dr. Bishai (Cause No. 19-11-14905) – the State will not try multiple indictments in a consolidated proceeding. For reasons set out below, this supplement is required for a fair consideration of Dr. Bishai's claims on appeal.

Dr. Bishai was charged in six indictments with violations of Texas Occupations Code § 165.152. Each of those indictments relied on Texas Occupations Code § 164.053 to set out the manner and means of the § 165.152 violations. Dr. Bishai was also charged in four indictments alleging violations of Texas Health & Safety Code § 481.128. Eight of the ten indictments were consolidated for a single trial. However, on March 19, 2021, the State notified the district court that it intended to proceed on only one of those indictments. Exhibit A.

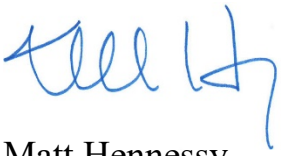
On April 13, 2021, Dr. Bishai filed pretrial applications for habeas relief challenging the six Occupations Code indictments (including Cause No. 19-11-14905), contending Texas Occupations Code §§ 165.152 and 164.053 are facially and unconstitutionally vague, and the district court denied relief. On appeal, the court of appeals refused to reach the merits of Dr. Bishai's challenge, holding the habeas claims were not cognizable because the six indictments based on the challenged statutes (Tex. Occ. Code §§ 165.152 and 164.053) were consolidated with indictments charging violations of an unchallenged statute (Tex. Health & Safety Code § 481.128) for a single trial under Texas Penal Code § 3.02. Panel Op. at 11. But, as Exhibit A demonstrates, the State did not intend to proceed on multiple indictments.

The State did not contend in the district court that consolidation of challenged indictments with unchallenged indictments rendered Dr. Bishai's habeas claims incognizable – the State did not contest cognizability at all in the district court. The State presented this argument for the first time on appeal, and the argument is at odds with the State's representation to the district court that it intended to try only one of the indictments against Dr. Bishai.

We believe Dr. Bishai's habeas claims are cognizable regardless of whether challenged indictments were consolidated with unchallenged indictments, but supplementation of the record is still warranted to ensure the resolution on appeal is based on accurate and complete information. Dr. Bishai thus requests the Clerk to supplement the clerk's record in each of the cases on appeal.[1]

[1] "An appellate court must not refuse to file the clerk's record or a supplemental record clerk's record because of a failure to timely request items to be included in the clerk's record." Tex. R. App. P. 34.5(b)(4).

Sincerely,



Matt Hennessy
Counsel for Emad Bishai

cc: Hon. Kathleen Hamilton
359th District Court
Montgomery County, Texas

Carly Latiolais
Clerk of the Court
Ninth Court of Appeals
1085 Pearl Street, Suite 330
Beaumont, Texas 77701

Tamara Holland
Amy Waddle
Assistant District Attorneys
Montgomery County, Texas

EXHIBIT A

From: Holland, Tamara
To: Mitchell, Susan
Cc: Chapell, Brent; samy@khalil.law; Matt Hennessy
Subject: Dr. Emad Bishai Trial
Date: Friday, March 19, 2021 9:45:32 AM

Susan,

I wanted to let the Court know that the State intends to proceed on 19-11-14905 for the May 17th trial setting. Since all the causes have been joined, I have been filing into 19-11-14893 only. I intend to start filing into the cases individually in the future.

I do not expect this to alter our 1.5 week trial estimate, but I still wanted to let you all know prior to the day of trial or docket call.

Tamara

Tamara Holland
Assistant District Attorney
Montgomery County District Attorney's Office
207 W. Phillips, Second Floor
Conroe, TX 77301
936-539-7800

CERTIFICATE OF COMPLIANCE

I certify this brief was prepared using 14-point font for the body and 12-point font for the footnotes. The word count of this document is 2,460, excluding the caption, identity of parties and counsel, table of contents, index of authorities, signature, proof of service, certification, certificate of compliance, and appendices, as counted by the word-count function of the Microsoft Word version used to prepare this petition.

/s/ Matt Hennessy
Matt Hennessy

CERTIFICATE OF SERVICE

I certify that a copy of this motion will be served on the Montgomery County District Attorney's Office via e-service.

/s/ Matt Hennessy
Matt Hennessy